

MEMORANDUM OF UNDERSTANDING

AMONG THE

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
U. S. DEPARTMENT OF THE INTERIOR/U. S. FISH & WILDLIFE SERVICE,
ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH
COUNTY,
AND

THE POLK COUNTY BOARD OF COUNTY COMMISSIONERS

REGARDING COORDINATION OF NATURAL RESOURCE DAMAGE
ASSESSMENT AND OTHER ACTIONS RELATED TO THE
MULBERRY PHOSPHATES, INC./ALAFIA RIVER ACID SPILL
OF DECEMBER 7, 1997

I. INTRODUCTION

This Memorandum of Understanding (MOU) by and between the Florida Department of Environmental Protection (DEP or the State), the National Oceanic and Atmospheric Administration of the United States Department of Commerce (NOAA), the United States Department of the Interior on behalf of the U. S. Fish and Wildlife Service (DOI/USFWS), the Environmental Protection Commission of Hillsborough County (EPC), and the Polk County Board of County Commissioners (Polk County) (collectively, the Parties) is entered to ensure coordination and cooperation among the Parties in implementing a timely and efficient assessment of damages for injuries to natural resources resulting from the "Incident" as defined in Section III below, and in identifying projects appropriate for use to restore, rehabilitate, replace or acquire the equivalent of injured natural resources or resource services. The rights and responsibilities contained in this MOU are intended to serve solely as guidance for the respective Parties.

II. AUTHORITIES

A. DEP, NOAA, and DOI/USFWS enter into this MOU in accordance with the natural resource authorities provided for by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. § 9601 et seq., the Federal Water Pollution Control Act,

33 U.S.C. § 1251 et seq., and other applicable Federal law including the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) Subpart G, 40 C.F.R. Sections 300.600 - 300.615 and the Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11. In addition, DEP enters into this MOU pursuant to authority provided by Chapters 376 and 403, Florida Statutes, and other applicable provisions of State law. EPC enters into this MOU pursuant to Chapter 84-446, Laws of Florida, as amended, and Section 403.182, Florida Statutes. Polk County enters into this MOU in accordance with Polk County Ordinance 93-06 and other applicable regulations.

B. The following officials, or their designees, represent agencies that act on behalf of the public under the above authorities with respect to natural resources being addressed under this MOU:

1. The Secretary of the Department of Environmental Protection, State of Florida,
2. The Deputy General Counsel, National Oceanic and Atmospheric Administration,
3. The Director of the Office of Policy and Compliance, U. S. Department of the Interior.
4. The Executive Director, Environmental Protection Commission of Hillsborough County,
5. The Polk County Board of County Commissioners, Director of Natural Resources.

III. LOCATION

This MOU is intended to address natural resources injured, destroyed or lost as a result of the unlawful discharge or release of acidic process water from Mulberry Phosphates Inc.'s phosphoric acid/fertilizer production facility in Mulberry, Polk County, Florida on December 7, 1997 (the Incident). The acidic process water entered the Alafia River and, ultimately, the waters of Tampa Bay.

IV. PURPOSE

The Parties recognize the importance of integrating and coordinating the assessment of natural resource damages for injuries to natural resources caused by the Incident, avoiding the potential for double recovery of natural resource damages and the duplication of assessment costs, seeking compensation for the injuries to natural resources, including the interim loss of resource services, and providing for the restoration of injured resources and/or resource services as expeditiously as possible. The Parties also recognize that a prompt resolution of public claims for natural resource damages is in the best interest of the public and the Parties. The purpose of this MOU is to provide a framework for the coordination and cooperation among the Parties necessary to achieve these common objectives and for the implementation of activities of the Parties in furtherance of their natural resource responsibilities. The Parties' activities will primarily involve assessing injuries to natural resources and selecting restoration projects to compensate for the injured natural resources and/or lost resource services resulting from the Incident.

V. ORGANIZATION

A. To effectively and efficiently meet their respective responsibilities under Federal and State law for affected natural resources, the Parties hereby create a Council to implement this MOU which Council is composed of a representative of each Party. Each Party designates its primary representative on the Council as follows:

1. For DEP:
Sam Zamani
Florida Department of Environmental
Protection
3804 Coconut Palm Drive
Tampa, FL 33619
813-744-6100
FX 813-744-6457

2. For NOAA:
John Iliff
NMFS Restoration Center
c/o NOAA Office of General Counsel
9721 Executive Center Dr. No., Suite 137
St. Petersburg, FL 33703

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813-570-5391
FX 813-570-5376

3. For DOI/USFWS: Robin Nims-Elliot
Regional NRDA Coordinator
U. S. Fish & Wildlife Service
Orangeberg National Fish Hatchery
P. O. Box 410
Orangeberg, SC 29116
803-531-8292, ext. 16
FX 803-531-8386

(NOTE: Overnight mailing address is:
Orangeberg National Fish Hatchery
Stonewall Jackson Drive
Hwy 21 Bypass
Orangeberg, SC 29115)

4. For Polk County: Joe King
Polk County, Natural Resources Division
4177 Ben Durrance Road
Bartow, FL
941-534-7377
FX941-534-7368

5. For EPC: Chris Dunn
Director of Wetlands Management Div.
Environmental Protection Commission
1900 9th Avenue
Tampa, FL 33605
813-272-5960
FX813-272-5157

Each Party shall also designate an alternate representative to the Council and shall notify each of the other Parties' primary representatives of the alternate's name, address, telephone and facsimile number within fourteen (14) days of the execution of this MOU.

B. The Council may create subcommittees as they deem necessary to effect the purposes of this MOU. A representative designated by unanimous consent of the Council members will serve as the Council's Coordinator

(Coordinator). The Coordinator shall fully coordinate its activities with and act under the direction of the Council. The Council may also seek advisory participation from the United States Department of Justice, the Attorney General of the State of Florida or other legal advisor and other State, Local and Federal agencies, when appropriate.

C. A Party may change its primary or alternate representative by providing written notice of the name, address, telephone and facsimile number of its new representative to each of the primary Council representatives of the other Parties. Such notices shall be considered addenda to this MOU.

VI. DUTIES AND RESPONSIBILITIES

A. Council

On behalf of the Parties, the Council shall plan, coordinate and authorize all Party activities and matters under this MOU in accordance with the decision making requirements contained in Section VII. The Council may take whatever actions the Council, in its discretion, determines are necessary to fulfill the responsibilities of the Parties under and to effectuate the purposes of applicable Federal and State law. It is expected that the Council, in accordance with applicable laws and policies, may take the following actions, among others, to address the Parties' respective responsibilities for natural resources affected by the Incident:

1. Plan and conduct scientific and technical studies, sampling and other investigative or analytical actions related to the assessment of natural resource damages with respect to the natural resources and/or resource services which have been lost, injured or destroyed as a result of the Incident.

2. Oversee the development of a plan for the restoration, replacement, rehabilitation and/or acquisition of equivalent resources for those natural resources, and/or resource services which have been injured, destroyed or lost as a result of the Incident.

3. In accordance with applicable law, arrange for such contracts for professional, technical, expert or other services as the Council determines are

necessary to implement assessment and restoration planning activities under this MOU.

4. Establish a subgroup and select a subgroup coordinator to identify and review restoration options and determine preferred restoration options.

5. Establish a subgroup and select a subgroup coordinator to quantify the injuries to natural resources and/or resource services resulting from the Incident and to plan and implement the strategies and/or methodologies to be used to calculate compensation for those injuries.

6. Establish a subgroup and select a subgroup coordinator to review enforcement and other legal issues.

7. Coordinate the manner and timing of any public participation in the assessment and restoration planning process for this Incident, as may be appropriate, including the issuance of any notices, press releases, or other form of public communications concerning matters within the scope of this MOU.

B. Council Coordinator

The Coordinator will act on behalf of the Council as a project manager for assessment and restoration activities under the MOU. The duties of the Coordinator shall include, but are not limited to: coordination and monitoring of the progress of the natural resource damage assessment process; scheduling of Council, subgroup, and Party technical meetings, as appropriate, and preparation of agendas for those meetings; acting as a *central contact point for the Council*; establishment and maintenance of records and relevant documents related to the function and activities of the Council; and such other duties as directed by the Council. The Coordinator will be responsible for informing the Council members of all pertinent developments on a timely basis.

C. Communications with Responsible Parties

The Parties agree that they will endeavor to have coordinated communications with the representatives of Mulberry Phosphates, Inc. (MPI) on matters related to the assessment of natural resource damages. To the maximum extent possible, no Party will discuss these matters with MPI without first providing the other Parties notice and an opportunity to

participate in such discussions. The above agreement shall not preclude a Party from having separate communications with MPI on matters within the scope of the MOU where circumstances warrant it (provided, that each Party agrees to keep the other Parties informed about such discussions) or on matters outside the scope of this MOU.

VII. DECISION MAKING

A. The Parties agree that all decisions implementing this MOU shall require consensus of the Parties. In the event that consensus cannot be reached among the members of the Council, the matter in dispute will be elevated within the Parties for resolution. If necessary, the Parties may establish further mechanisms by which disputes may be resolved. The Parties further agree that decision making deliberations will focus upon the Parties' mutual purpose of assessing natural resource damages and restoring, rehabilitating, replacing and/or acquiring the equivalent of the affected natural resources, rather than upon control or respective Trusteeship over those resources.

B. The designation of representatives in this MOU is for coordination and planning purposes only. For each Party, the designation of a representative herein does not constitute a delegation of any legal or policy making authority nor does it authorize the representative to create policy positions, to create liabilities or debts against the Party, or otherwise legally obligate the Party in any way.

VIII. ANTICIPATED SCHEDULE

The Parties share the desire for timely and prompt resolution of this case. To this end and to the extent possible without compromising the technical or scientific integrity of assessment activities, the Parties agree that the Council should strive to complete the initial collection of raw data and provide initial estimates of the recovery time for injured fishery resources or the affected system by no later than June 1, 1998. The Parties also agree that the initial screening of the potential restoration options should be completed no later than August 1, 1998. All other assessment actions should be completed as expeditiously as possible.

Once these actions have been completed, the Parties agree to coordinate and decide whether a unified proposal to MPI to the natural resource damage claims of the Parties can be made. The Parties agree that the assessment of damages and identification of restoration options must be substantially complete before finalizing any settlement.

IX. CONFIDENTIALITY

The Parties agree that it is in the public interest that all scientific data arising out of their review of the injury to natural resources resulting from the Incident be made public. Therefore, such data shall be available to the public in accord with Chapter 119, Florida Statutes, and applicable federal law. Public sharing of scientific data will be the general policy of the Parties.

Nothing herein shall prevent any Party from acting to protect any document or other information as attorney work product, privileged attorney-client communications, deliberative process, or other applicable privilege (or combination thereof), as that Party deems appropriate in relation to its own records.

Each Party further agrees that whenever it receives a request for the production of any record related to the assessment and recovery of natural resource damages resulting from the Incident, it will notify the other Parties of such request and whether the record has been or will be released. Nothing contained herein shall be construed as prohibiting or restraining the Parties or the Council from agreeing to release any record.

X. MODIFICATION OF AGREEMENT

It is acknowledged that additional agreements may be needed among the Parties with regard to natural resource damage claims that arise and planning for the restoration, replacement, rehabilitation and/or acquisition of equivalent natural resources that have been injured, destroyed or lost as a result of the Incident. All such modifications of this MOU must be in writing and approved by all Parties currently parties to the MOU.

XI. TERMINATION

This MOU shall be in effect from the effective date as defined in Section XIV until termination by agreement of the Parties. At any time the Parties determine that the purposes underlying this MOU have been fulfilled the MOU will terminate upon such a finding. In the event any Party withdraws from the MOU, such withdrawal must be in writing at least thirty days in advance of the withdrawal. Each Party shall have the right to withdraw from this MOU at any time following the giving of notice as hereinafter provided. In the event of such withdrawal, this MOU remains in full force and effect for the remaining parties. After terminating its participation in this MOU, no Party shall challenge any decision made by the Council that was previously approved in writing by the withdrawing Party.

XII. LIMITATION

The rights and responsibilities contained in this MOU are subject to the availability of funding. Nothing in this MOU shall be construed as obligating the United States, the State or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

XIII. EXECUTION: EFFECTIVE DATE

This MOU may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOU. The effective date shall be the date that the last Party to sign this MOU does so sign.

IN WITNESS WHEREOF, the parties hereto have signed this MOU on the day and year appearing opposite their signatures.

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION



Craig O'Connor
Deputy General Counsel, National Oceanic
and Atmospheric Administration

6/10/98

Dated

UNITED STATES DEPARTMENT OF THE INTERIOR

Willie R. Taylor
Director, Office of Environmental Policy
and Compliance

Dated

STATE OF FLORIDA

Virginia B. Wetherell
Secretary, Florida Department of
Environmental Protection

Dated

**ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH
COUNTY**

Roger P. Stewart
Executive Director, Environmental Protection
Commission of Hillsborough County

Dated

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Craig O'Connor
Deputy General Counsel, National Oceanic
and Atmospheric Administration

Dated

UNITED STATES DEPARTMENT OF THE INTERIOR

Terence N. Martin for

Willie R. Taylor
Director, Office of Environmental Policy
and Compliance

7/9/98

Dated

STATE OF FLORIDA

Virginia B. Wetherell
Secretary, Florida Department of
Environmental Protection

Dated

ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH
COUNTY

Roger P. Stewart
Executive Director, Environmental Protection
Commission of Hillsborough County

Dated

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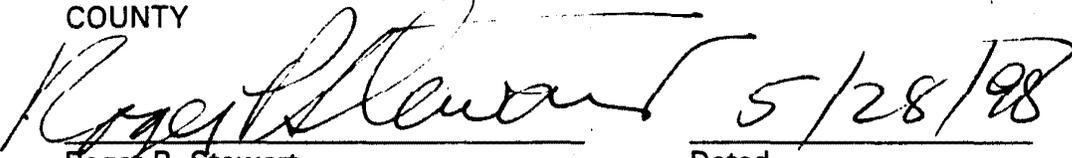
Dated

STATE OF FLORIDA

Virginia B. Wetherell
Secretary, Florida Department of
Environmental Protection

Dated

ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH
COUNTY



Roger P. Stewart
Executive Director, Environmental Protection
Commission of Hillsborough County

Dated 5/28/98

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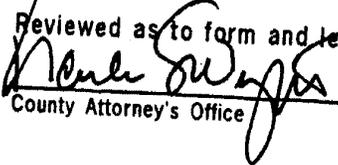
POLK COUNTY



Jerry Carter,
Chairman, Polk County Board
of County Commissioners

6/16/98

Dated

Reviewed as to form and legal sufficiency


County Attorney's Office 6-16-98
Date